SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

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No. 504

L. T. ROSECRANS, MARY B. ROSECRANS, J. M. BAILEY, ADMINISTRATOR OF THE ESTATE OF MARY A. ROSECRANS, DECEASED, ET AL., *Appellants,*

vs.

THE WEST EDMOND SALT WATER DISPOSAL ASSOCIATION, A JOINT ASSOCIATION, PEPPERS REFINING COMPANY, SKELLY OIL COMPANY, ET AL., *Appellees*

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 33712

THE WEST EDMOND SALT WATER DISPOSAL ASSOCIATION, ET AL.,

Plaintiff-in-Error,

vs.

L. T. ROSECRANS, ET AL.,

Defendants-in-Error

STATEMENT OPPOSING JURISDICTION; MOTION TO DISMISS APPEAL AND BRIEF IN SUPPORT THEREOF

Statement Opposing Jurisdiction

I

The record does not show that any question involving the validity of a state statute under the Fourteenth Amendment of the Constitution of the United States was decided by the Supreme Court of Oklahoma.

II

The record shows that the decision of the Supreme Court of Oklahoma is based upon adequate local and non-Federal grounds.

III

The record shows that the decision of the Supreme Court of Oklahoma is based solely upon questions of fact presented in the trial below.

IV

The record does not present for decision any substantial Federal question.

Motion to Dismiss

Plaintiffs-in-error move to dismiss this appeal on the ground that no Federal question is involved.

No statute of the State, order of Oklahoma Planning and Resources Board or order of the Corporation Commission purported to authorize, or was construed by the Supreme Court of Oklahoma to authorize, the infliction of injury upon defendants-in-error or their land, or to exempt plaintiff-in-error from liability therefor.

The Supreme Court of Oklahoma, far from construing the statutes and orders as exonerating plaintiffs-in-error from liabilty for injury to the land of defendants-in-error held that plaintiffs-in-error would be liable for such injury, and it reversed the judgment of the trial court upon the sole ground that the evidence showed that defendants-in-error had suffered no injury.

BRIEF IN SUPPORT OF JURISDICTIONAL GROUNDS AND MOTION TO DISMISS APPEAL

Statement

In this brief the defendants-in-error will be referred to as appellants, and the plaintiffs-in-error as appellees.

Appellants own 160 acres of land near the West Edmond oil field in Oklahoma. Appellees produce oil in that field, and in doing so they also produce large quantities of salt water which must be disposed of. It is a violation of both the civil and criminal laws of the State to pollute the streams or poison the surface of land with it. In that situation appellees obtained permission of the owner of 40 acres of land, in the center of which a dry well had been drilled and abandoned, to pump the salt water into that well; and they applied to and obtained permission of the Oklahoma Planning and Resources Board and the Corporation Commission to do so.

While appellees were doing so, appellants, whose land adjoined the 40 acres, sued them in a state court upon five causes of action, alleging that the salt water put into the well percolated or was forced into the formation underlying their land. In the first cause of action they alleged that that constituted an eviction, and prayed judgment for the possession of the land and that appellees be ejected therefrom. In the second they prayed an injunction enjoining appellees from continuing their operation. In the third they prayed judgment for "mesne profits and benefits enjoyed and produced by the defendants" in the sum of $50,000. In the fourth they alleged that appellees' acts constituted "underground trespass upon and physical invasion of" their lands, to their damage in the sum of $25,000. In the fifth they alleged that appellees had acted

wantonly, arbitrarily and oppressively, and prayed punitive damages in the sum of $50,000.

The jury returned a verdict for appellants on the first, third and fifth causes of action, but the trial court set aside the verdict as to the fifth, which awarded punitive damages, and rendered judgment in favor of appellants in ejectment and for $12,500 damages upon the first and third causes of action, from which appellees appealed to the Supreme Court of Oklahoma.

That court reversed the judgment with directions to set aside the verdict and render judgment for appellees. This appeal is from the judgment of the Supreme Court.

The Legislation

We know of no statute purporting to confer upon either the Oklahoma Planning and Resources Board or the Corporation Commission power to authorize the injection of salt water into a well, or to exempt those doing so from liability for injury caused thereby.

Sec. 296, Tit. 52, O. S. 1941, is as follows:

> "No inflammable product from any oil or gas well shall be permitted to run into any tank, pool or stream used for watering stock; and all waste of oil and refuse from tanks or wells shall be drained into proper receptacles at a safe distance from the tanks, wells or buildings, and be immediately burned or transported from the premises, and in no case shall it be permitted to flow over the land. *Salt water shall not be allowed to flow over the surface of the land.*"

The Oklahoma statutes prohibit the waste of oil and gas, and include in the definition of waste "underground waste, including water encroachment in the oil and/or gas bearing strata" (Sec. 85, Tit. 52, O. S. 1941). And Sec. 237 of the same title defines waste of gas as including the "intentional drowning with water of a gas stratum capable of

producing gas in commercial quantities." And those statutes confer upon the Corporation Commission power to prevent, but not to permit, such waste.

The Oklahoma Planning and Resources Board was created by Oklahoma Session Laws 1936-37, Chap. 23, p. 74, Sec. 3 of which provided:

> "All rights, powers, duties and limitations of the Conservation Commission, Oklahoma Forest Commission, and the Oklahoma State Planning Board be and the same are hereby conferred upon and transferred to the Oklahoma Planning and Resources Board."

Among the powers conferred are the following:

> "Said Board is hereby given the right and authority to regulate and control the pollution of all streams, creeks, lakes, rivers, water courses, and sub-surface water, in the state of Oklahoma and flowing through the state of Oklahoma. If any person, firm or corporation shall violate any law, rule or regulation, said violation thereof shall be deemed a misdemeanor and upon conviction punished accordingly. Nothing herein contained shall be construed as affecting or limiting the powers now given by statute to the Corporation Commission or the Proration Commission in the regulation and control of streams and water pollution." (Okla. Stat. 1941, Tit. 74, Sec. 351c).
>
> "(b) To control rivers, creeks, ponds and lakes, to prevent or aid in the prevention of damage to person or property from such harmful waters within the State of Oklahoma; the Conservation Commission is authorized to adopt and apply the necessary methods and means to purify and render sanitary all water impounded by or under its authority and also to prevent the contamination or pollution of any and all reservoirs, ponds, lakes, creeks, and rivers and to call upon the Attorney General to bring any suit or action by the Commission deemed necessary to effect this object." (Okla. Stat. 1941, Tit. 82, Sec. 486).

It is thus seen that the power of the Corporation Commission with respect to the injection of water into a well is restricted to preventing the drowning of oil and gas bearing strata, and that of the Planning and Resources Board is restricted to preventing pollution of streams, lakes and subsurface water, and preventing damage to persons or property thereby. Properly construed, those acts do not require permission of the Corporation Commission or the Planning and Resources Board for the injection of salt water into an abandoned well that will neither drown an oil and gas bearing stratum or pollute streams or water wells; and appellees applied for the orders only out of an abundance of caution. The orders did not purport to exempt appellees from liability for damage done to others, and neither tribunal had power to do so.

The Supreme Court's Opinion

In its opinion the State Supreme Court found as follows:

> "That immediately west of the property of plaintiffs, in the center of a 40-acre tract adjoining the land of plaintiffs, was located an abandoned oil well known as the Robson well, and that defendants purchased from the owners of that land the right or permission to inject into said dry and abandoned well, in a stratum or formation known as the Hoover-Tonkawa formation, salt water piped to said dry and abandoned well from other wells operated by defendants in the West Edmond field, which were producing salt water in considerable quantities along with oil and gas. From the evidence it further appears that this Hoover-Tonkawa formation was a porous sand formation or series some 500 feet thick underlying the 40-acre tract upon which the abandoned well was located, and underlying also the land of plaintiffs and the entire West Edmond oil field, said formation being 4,500 feet below the sur-

face of the land; that said formation was completely saturated with salt water, and that no oil or gas was being or could be produced therefrom.

"It also appears that the abandoned well had been so plugged and cemented that all oil sands below and above the Hoover-Tonkawa formation were protected from the salt water injected into said well, so that there was no possibility that the injection of salt water into it would in any way injure any other formation or strata in said field from which oil or gas or fresh water was being or could be produced."

Further on the Court said:

"According to one witness almost half of the salt water so injected would migrate or percolate into the formation under the land of plaintiffs, displacing a similar amount of salt water which would be pushed further east. Plaintiffs did not give the defendants permission to so push or force their salt water into the formation under plaintiffs' land, but before the Corporation Commission and at all other times objected to the injection of salt water into said formation by defendants.

"The evidence shows that the salt water in the Hoover-Tonkawa formation was confined to that formation by impervious shale or clay formations immediately above and below it, so that salt water contained in said formation could not seep or percolate into the strata above or below the said formation, and that the said formation was saturated with salt water and was of great extent, the actual boundaries thereof not being capable of accurate ascertainment. At the time of trial, June 9, 1947, the witnesses testified that the total volume of salt water injected into the well was some 4,156,370 barrels. One of the witnesses for plaintiff testified that this amount was trifling when compared to the vast amount of salt water contained in the Hoover-Tonkawa formation, testifying that it was comparable to dropping an eyedropper full of water into the ocean.

> "The plaintiffs produced no evidence tending to prove actual damages to their land or interference of any kind with the full use and enjoyment of the land by them. By one witness they offered to prove that the forcing of salt water into the said formation might eventually produce erosion and result in the cutting of channels or canals in the formation so that there would be a leakage of salt water from this formation to the sands below them. This offer was denied by the trial court. It is conceded that the defendants had not invaded, trespassed upon, or taken possession of the land of plaintiffs, or any portion thereof, save and except by the injection of salt water into the said formation and its migration or percolation into that portion of the formation which underlies the land of plaintiffs."

And the Court stated the question involved as follows:

> "The decisive question presented for determination is whether the owner of land, who injects, through a well upon his premises, salt water into an underground stratum which contains nothing but salt water, which salt water so injected, commingling with the salt water in said stratum, migrates or percolates into the portion of said stratum underlying the land of his neighbor, thereby trespasses upon the lands of his neighbor, or takes wrongful possession of the portion of such stratum underlying the land of his neighbor, so as to become liable to his neighbor therefor, although no actual damage is inflicted upon or suffered by his neighbor, nor is he deprived of any right pertaining to, or consistent with, the full and complete use, occupation, or enjoyment of his land."

The Supreme Court, far from understanding that appellees contended that the statutes and orders involved exempted them from liability for injury done by them, said:

> "The defendants and the Attorney General unhesitatingly admit and affirm the liability of the defendants

or other oil producers disposing of salt water by injection into underground formations for any actual damage or injury resulting therefrom to adjoining property owners. But they assert that the mere injection of salt water in the Robson well, and its migration into the salt water bearing formation underlying the land of plaintiffs, does not in itself, absent any injury or damage to the land of plaintiffs, or any deprivation of their right to use, occupy, and enjoy their lands, constitute an unlawful or wrongful trespass upon or taking possession of the land of plaintiffs or any portion thereof in such fashion that plaintiffs could maintain ejectment against them, or could maintain an action for mesne profits, or could enjoin them on the theory of a continuing trespass. They assert that the only liability of the defendants is a liability for actual damage or injury to the land of plaintiffs, or the deprivation of some right previously vested in plaintiffs to use, occupy, and enjoy their property fully and completely."

And as to that contention it said:

"Careful consideration of the authorities cited in the briefs of the respective parties, and other authorities examined by us, convinces us that the contention of the plaintiffs is untenable; that the defendants have not trespassed upon the land of plaintiffs, nor taken possession of any part thereof; nor deprived the plaintiffs of any right in the full and complete possession and use of their property, and that the contention of defendants that they are liable only for actual damage suffered by plaintiffs resulting from the injection of salt water into said well must be sustained."

Further on it said:

"In the instant case, conceding that the salt water injected into the Robson well would migrate into the Hoover-Tonkawa formation under the land of plaintiffs, the only effect of such migration, according to

the testimony of plaintiffs' own witnesses, was to displace a similar amount of salt water in said formation and cause it to migrate further east. Under this testimony, the formation being already saturated with salt water, the acts of defendants did not increase the amount of salt water under plaintiffs' land or render it any more deleterious or detrimental to plaintiffs' land than it had been before.

* * * * * * *

"The applicable and governing principle in this case is the rule of reasonable use, that is, that a person may use his property in any lawful manner, except that he must not use it so as to injure or damage his neighbor. * * *"

"Measured by this rule, we find that the act of the defendants in injecting salt water into said well was lawful, and that in the exercise of such right defendants did not take the property of plaintiffs or any part thereof, or injure or damage same, or deprive the plaintiffs of any rights in connection therewith. This being the case, there was no basis or foundation upon which plaintiffs could maintain any of the causes of action asserted in their petition, and the motion for directed verdict made by the defendants at the close of all the evidence should have been sustained."

It is thus seen that this is not a case "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity." The substance of the decision was that the statutes and orders did not exempt appellees from liability for injury caused, but that no injury was in fact caused. The situation would be different if appellants had been injured, and the Supreme Court had held that the statutes and orders exempted them from liability, and were nevertheless valid. But that was not its holding.

Even if appellees' acts were wrongful, the question would be whether a state law that denies recovery on account of them where no injury has been suffered is violative of the 14th Amendment;—whether under that amendment damages must be awarded for wrongful acts though no injury has resulted. To state the question is to answer it. This cause was decided solely upon a question of fact and not upon the determination of the constitutionality of any statute or order.

It is submitted that the statement opposing jurisdiction is well taken; that this cause involves no Federal question, and that the appeal should be dismissed.

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